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No. 09-1486

In The Supreme Court of The United States

TAMARA J. FISHER, *ET AL.*,
Petitioners,

v.

MCCRARY CRESCENT CITY, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

While petitioners attempt to raise three questions for this Court related to a ruling upholding Maryland's exercise of personal jurisdiction over them, those questions are not properly before this Court because the Petition was jurisdictionally untimely, and one of the petitioners failed to properly raise these issues below. The lower court's ruling simply represents a faithful and unexceptional application of this Court's well settled personal jurisdiction jurisprudence, is not indicative of any split of authority among lower courts, and provides no basis for a grant of certiorari to the Court of Special Appeals of Maryland. The questions presented by Petitioners are based on a misreading of the opinion below, inapposite case law, and misstatements of the record.

Rule 29.6 Statement

No parent corporations or publicly held corporations own 10% or more of the membership interests of any of Respondents.

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Statement of the Case

In January, 2005, Edward V. Giannasca, II ("Giannasca,") approached Michael C. McCrary ("McCrary,") in Baltimore, Maryland, soliciting an investment by McCrary in the acquisition and condominium conversion of a 45 story office tower located in New Orleans, Louisiana (the "Building"). Giannasca was a Maryland resident and McCrary was a recently retired Baltimore Raven football player and both had their principal places of business in Maryland. Giannasca told McCrary the purchase price for the Building was $4 million and McCrary ultimately agreed to provide $3 million in exchange for a first mortgage position on the Building and 50% ownership of the venture.

In February, 2005, Crescent City Estates, LLC ("Crescent City") was formed as a Louisiana limited liability company. Fifty percent of the membership interests in Crescent City were beneficially owned by McCrary through respondents McCrary Crescent City, LLC ("McCrary Crescent City,") and MR Crescent City, LLC ("MR Crescent City,") and the remaining 50% was beneficially owned by Giannasca and his then wife Suzanne through Giannasca Crescent City, LLC ("Giannasca Crescent City.") Giannasca was designated as manager of Crescent City.

Royal Plaza Tower, LLC ("Royal Plaza,") was the holder of a contract to purchase the Building for $4 million, which it assigned to Crescent City. Crescent City purchased the building on March 8, 2005, and mortgages were recorded securing McCrary's $3 million investment and an additional $1 million loan from a third party. Giannasca

subsequently executed an additional $4 million mortgage in favor of Royal Plaza. Petitioner Tamara Jeanne Fisher ("TJ Fisher") was the owner of a 25% membership interest in Royal Plaza, and her husband, Stuart C. ("Neil") Fisher ("Fisher") was the manager. Unknown to McCrary at the time, Giannasca and Fisher were business associates and had apparently agreed to share their interests in Crescent City and Royal Plaza. Between January, 2005 and August, 2005, McCrary met Fisher and TJ Fisher on a number of occasions in New Orleans, and they were both aware he and Giannasca were from Baltimore.

In August, 2005, the Building suffered damage from Hurricane Katrina. Shortly thereafter, Giannasca filed insurance claims on behalf of Crescent City (the "Insurance Claims,") and, without informing McCrary, hired a public insurance adjuster in early September, 2005 to represent Crescent City in prosecuting the Insurance Claims. In early October, 2005, McCrary was told the Insurance Claims were "looking good," but in late October, 2005, he was advised by Giannasca and Fisher the Insurance Claims were likely to be denied. In November and December, 2005, in meetings in Baltimore he was told the Insurance Claims had been denied. Those statements were lies made in furtherance of a conspiracy among Fisher, TJ Fisher, Giannasca and entities owned by them to conceal and misappropriate payments of the Insurance Claims.

Crescent City's operating agreement required Giannasca to deposit all Crescent City funds in bank accounts in Crescent City's name in the state of Maryland. Giannasca did not do so. In mid-October

the insurance company issued an initial $1 million check to Crescent City as an advance against the ultimate settlement of the Insurance Claims. That payment was concealed from McCrary, deposited in an account opened by Giannasca in a New Orleans bank, and pursuant to the conspiracy the bulk of that payment was secretly divided among Giannasca, Fisher, and petitioner TJ Biscayne Holdings, LLC ("TJ Biscayne"), a Florida limited liability company 100% owned by petitioner TJ Fisher.

Crescent City sold the Building on November 9, 2005. The proceeds of sale were first applied to pay the outstanding mortgages, including the Royal Plaza mortgage, and the closing statements shown to McCrary indicated the remaining profits were equally distributed to McCrary and the Giannascas. In fact, however, Fisher, TJ Fisher and the Giannascas shared the Giannascas' half of the profit from the sale as well as TJ Fisher's portion of the Royal Plaza Mortgage.

In October, November and December, 2005, at meetings in Crescent City's Baltimore, Maryland office, in furtherance of the conspiracy Giannasca concealed receipt of the first $1 million insurance advance and repeatedly lied to McCrary and his representative, telling them the Insurance Claims would be and had been denied. On at least one occasion, Fisher participated in those meetings by conference call. In January, 2006, in Crescent City's Baltimore office, Giannasca secretly executed a Sworn Proof of Loss and an Indemnification Agreement on behalf of Crescent City and transmitted those documents to the insurance

company in satisfaction of prerequisites to additional payments of the Insurance Claims.

In early February, 2006, the insurance company sent the public insurance adjuster a $2 million check payable to Crescent City as an additional advance payment of the Insurance Claims. In furtherance of the conspiracy, Giannasca and/or Fisher told the insurance adjuster to deliver the check to Fisher. On February 6, 2006, without any authority to do so, Fisher opened a checking account in Crescent City's name at a Florida branch of Bank of America, using an altered and counterfeit document purporting to be Crescent City's operating agreement (the "Fisher Operating Agreement") which Fisher admitted preparing immediately prior to opening the account. The Fisher Operating Agreement was back-dated to February 25, 2005, the date Crescent City was formed, and falsely portrayed Fisher as Crescent City's 100% owner and manager. Fisher endorsed the $2 million insurance check as manager of Crescent City, deposited the check into the newly opened account, immediately transferred $1.7 million to his personal account and simultaneously transferred the same $1.7 million to petitioner TJ Fisher's personal account. A week later, TJ Fisher used that $1.7 million to pay off a mortgage on her home held by Bank of America.

The Fisher Operating Agreement was never the operating agreement of Crescent City, Fisher was never the manager of Crescent City, at all times relevant to the case Fisher was not an owner of any membership interest in Crescent City, and Fisher was never authorized to open a bank account or endorse or cash any check payable to Crescent City.

In March, 2006, a $7 million check was issued to Crescent City by the insurance company and delivered to the public insurance adjuster who then transmitted the check to Fisher. Fisher endorsed and deposited that check into the Bank of America account and transferred $5 million to petitioner TJ Biscayne, who in turn transferred $4.2 million to petitioner TJ Fisher. Similarly, in April, 2006, the insurance company issued a $2 million check to Crescent City as the final payment of the Insurance Claims, which was similarly deposited by Fisher and distributed to himself, Giannasca and petitioner TJ Fisher.

TJ Fisher testified she never owned any certificates of deposit, but the insurance proceeds transferred to the accounts of petitioners TJ Fisher and TJ Biscayne were converted into certificates of deposit at Bank of America and ultimately used in connection with the purchase of real estate directly benefitting petitioner Market Street Properties Palm Beach, LLC ("Market Street"). Petitioner TJ Fisher is the sole owner of Market Street.

The total amount of the settlement of the Insurance Claims was $12,000,000 (the "Insurance Proceeds.") At no time did Giannasca, Fisher or TJ Fisher disclose to McCrary or account for their receipt of any of the Insurance Proceeds. On July 29, 2006, at a social event given by Fisher and TJ Fisher in New Orleans, McCrary was introduced to an individual who identified himself as the public insurance adjuster retained to represent Crescent City. The adjuster told McCrary he was the person "who got the pot of gold for you guys." This was the first time McCrary learned anything about an insurance settlement, and after pressing for further

details he was told the Insurance Proceeds totaled $12 million.

On February 23, 2007, on behalf of themselves and derivatively on behalf of respondent Crescent City, McCrary, MR Crescent City and McCrary Crescent City filed suit (the "Maryland Case") in the Circuit Court for Baltimore City (the "Trial Court,") against Fisher, Giannasca and Giannasca Crescent City, alleging conspiracy, fraud, conversion, breach of contract and other causes of action related to the concealment and misappropriation of the Insurance Proceeds and other funds. Personal service of the summons and complaint was effected on Giannasca and Fisher in Maryland. A few days later, the Trial Court issued a temporary restraining order requiring, among other things, production of certain documents including release of bank records which might reveal the disposition of the insurance proceeds.

Bank records and other documents obtained pursuant to the temporary restraining order revealed the participation of petitioners TJ Fisher, TJ Biscayne and Market Street in the conspiracy and their receipt of substantial portions of the Insurance Proceeds. An amended complaint was filed in the Maryland Case adding petitioners as defendants, and on May 26, 2007, personal service of the summons and amended complaint was made on TJ Fisher in Orlando Florida. Service on TJ Biscayne and Market Street was made on their respective resident agents.

A notice of deposition and document subpoena was also served on TJ Fisher on May 26, 2007, specifying July 31, 2007, for her appearance. On

July 23, 2007, TJ Fisher and Market Street filed a Motion to Dismiss for lack of personal jurisdiction (the "Motion to Dismiss"). TJ Fisher failed to appear for her deposition and did not produce any documents. Following a hearing on April 28, 2008[1], the Motion to Dismiss was denied.

TJ Fisher did not appear at the hearing and or produce any documents. TJ Fisher subsequently failed to appear for yet another scheduled deposition. Pursuant to a court order she ultimately appeared days before the scheduled trial date at which time she professed lack of knowledge of any relevant facts—including the source or use of over $5 million in her personal bank accounts—and failed to produce most of the requested documents, including her personal bank records.

Ultimately orders of default as to liability were entered against Fisher and TJ Fisher for failure to make discovery, and against Giannasca

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[1] The hearing on the Motion to Dismiss, along with motions for default judgments against other defendants, was originally scheduled for August 27, 2007. On August 23, 2007, Fisher and Giannasca filed an unauthorized bankruptcy case on behalf of Crescent City in the United States Bankruptcy Court for the Eastern District of Louisiana (the "Bankruptcy"). The next day petitioners joined with the other defendants in the Maryland Case in filing a Notice of Removal of the Maryland Case to the United States Bankruptcy Court for the District of Maryland along with a Motion to Transfer the Maryland Case to the Louisiana bankruptcy court. On March 13, 2008, the Motion to Transfer was denied, and the Maryland Case was remanded to the Trial Court. Following a three day evidentiary hearing the Bankruptcy was dismissed for lack of authority on March 20, 2008. The Maryland Case resumed in April, 2008.

and Giannasca Crescent City for failure to answer. TJ Biscayne neither answered the complaint nor filed any preliminary motions, and summary judgment as to liability was entered against it at trial. At the time of trial, Fisher was in contempt of court for walking out of his deposition and failing to obey numerous court orders to return, failure to produce documents, and failure to comply with a temporary restraining order. Giannasca failed to appear for his deposition on three occasions, and only the threat of incarceration caused him to ultimately appear.

Because of the pervasive contempt for court orders and systematic obstruction of discovery, the defendants were sanctioned with orders precluding them from participating in the damages inquisition. In rendering his judgment for $33 million in compensatory and punitive damages, Judge Paul Alpert, former judge in the Baltimore County Circuit Court and Court of Special Appeals of Maryland, said

> I've seen a lot of cases and I've read a lot of cases over that period of time, which is more than 50 years. I have never seen such an egregious and blatant display of fraud, misconduct and abuse and misuse of the legal system as the allegations and proffers that I have read and seen here in the last two days.

All defendants appealed, and on June 8, 2009, the Court of Special Appeals of Maryland affirmed the trial judge's ruling that petitioners were properly subject to the personal jurisdiction of the Trial

Court, and affirmed the judgments as to liability of all defendants. The monetary award was vacated, however, and the case was remanded for a new damage hearing because the court held precluding defendants from any participation in the damages inquisition was an abuse of discretion. Pursuant to Maryland Rule 8-605, Petitioners filed a Motion for Reconsideration which was denied on September 1, 2009, and the mandate of the Court of Special Appeals of Maryland was filed the same day. Petitioners filed a petition for a writ of certiorari in the Court of Appeals of Maryland which was denied on December 11, 2009.

Notwithstanding the absence of any Maryland Rule or other procedure authorizing the filing of a request for reconsideration of denial of a petition for writ of certiorari, on January 11, 2010, petitioners filed a Motion for Reconsideration pursuant to Maryland Rule 8-605, which is completely inapplicable and clearly untimely under the express provisions of that rule. That motion was denied on March 12, 2010.

Reasons Why The Petition Should Not Be Granted

The three questions allegedly warranting review of Maryland's exercise of personal jurisdiction over petitioners are not properly before this Court on jurisdictional grounds. One of the petitioners never properly raised these issues below, and the Petition itself was jurisdictionally untimely. Substantively, in their vain effort to transform a garden-variety ruling on personal jurisdiction into an issue appropriate for review by this Court, petitioners rewrite not only the factual record, the ruling by the

Trial judge, and the decision of the Court of Special Appeals of Maryland, but also the very precedents on which petitioners purport to rely.

Neither the Trial Court nor The Court of Special Appeals of Maryland applied any "novel" or broader theory of personal jurisdiction as petitioner would have this Court believe. Petition at 9. Nor did they substitute "willful blindness" for the long-settled teachings of this Court in upholding personal jurisdiction over petitioners. *Id.* The decision was based instead on a substantial body of evidence corroborating petitioners' election to join a conspiracy to conceal and fraudulently misappropriate $12 million from Crescent City and McCrary with full knowledge acts in furtherance of the conspiracy were likely to be performed in Maryland. The lower courts determined at the time petitioners deliberately chose to participate in the conspiracy and accept the stolen funds, they had a reasonable expectation or "fair warning" their co-conspirators acts could subject them to jurisdiction in Maryland if their scheme were discovered.

That ruling is unexotic and certainly supplies no occasion for review by this Court. All necessary guidance was already supplied by numerous previous decisions of this Court, faithfully stated and applied by the Court of Special Appeals. Equally unavailing are petitioners' suggestions that lower courts are in conflict or confused regarding the application of appropriate due process standards for personal jurisdiction. Finally, because of the procedural history and conduct of petitioners and their co-defendants before the Trial Court, this case does not present an appropriate record for

articulation of a factual due process threshold for personal jurisdiction over a non-resident conspirator.

1. The Petition Was Jurisdictionally Untimely and TJ Biscayne Never Raised These Issues In The Trial Court.

Supreme Court Rule 13.1 provides

> A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the *order denying discretionary review*.

(Emphasis added.) The Court of Appeals denied the petition for writ of Certiorari on December 11, 2009, and the 90 day period expired on approximately March 11, 2010. The Petition was not filed until June1, 2010.

In their jurisdictional statement petitioners said: "The Maryland Court of Appeals' order denying Petitioners Petition for Certiorari was entered on December 11, 2009. The Maryland Court of Appeals' order denying Petitioners motion for reconsideration was entered on March 12, 2010." (Petition at 1.)

On January 11, 2010, petitioners filed a Motion for Reconsideration of the Court of Appeals' denial of certiorari pursuant to Maryland Rule 8-605. There is no provision in the Maryland rules for a motion to reconsider denial of a writ of certiorari, and Maryland Rule 8-605 is obviously inapplicable since it only provides for "...reconsideration of a

decision by the Court that *disposes of the appeal*," and requires the motion to be filed "(1) before *issuance of the mandate* or (2) within 30 days *after the filing of the opinion of the Court*, whichever is *earlier*." Maryland Rule 8-605(a). (Emphasis supplied.)

The Court of Appeals of Maryland does not issue mandates or file opinions with respect to certiorari petitions. A petition for certiorari to the Court of Appeals is not a proceeding dispositive of an appeal. *See, Skeens v. Paterno*, 60 Md.App. 48 (1984). Obviously Maryland Rule 8-605 does not apply. The deadlines set forth in Maryland Rule 8-605 had also long passed by January, 2010. The opinion of the Court of Special Appeals was filed on June 8, 2009, and the mandate of the Court of Special Appeals of Maryland was filed on September 1, 2009, the same day a motion to reconsider its opinion filed by petitioners was denied. In accordance with the provisions of Maryland Rule 8-605, any motion for reconsideration had to be filed before September 1, 2009 and therefore obviously does not apply to reconsideration of a petition for certiorari which can only be filed after the mandate is issued.

Supreme Court Rule 13.3 says

> [b]ut if a *petition for rehearing* is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested

> rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

Obviously, petitioners treated their motion for reconsideration as a petition for rehearing within the meaning of Supreme Court Rule 13.3, but such a position is contrary to the language of the rule itself and the cases and legislative history surrounding that provision.

Supreme Court Rule 13.3 speaks of a petition for "rehearing." There are no hearings on petitions for certiorari in the Court of Appeals of Maryland, so a petition for a rehearing is an oxymoron. Substantively, the rationale behind the tolling of the period for filing a petition for a writ of certiorari pursuant to Supreme Court Rule 13.3 is during the pendency of an actual petition for rehearing there is no "judgment" to be reviewed until the petition for rehearing is resolved. *See, e.g., Hibbs v. Winn*, 542 U.S. 88 (2004); *Missouri v. Jenkins*, 495 U.S. 33 (1990). In fact, filing of a proper motion under Maryland Rule 8-605 has precisely that effect: the courts cannot proceed under the terms of the judgment, and the mandate may not be filed until reconsideration is acted upon. The Motion for Reconsideration filed by petitioners in the Court of Appeals of Maryland had no such effect and is not a petition for rehearing contemplated by Supreme Court Rule 13.3. Therefore, the deadline for filing a petition for a writ of certiorari in this Court expired 90 days after December 11, 2009, the date the Court of Appeals of Maryland denied discretionary review. Because petitioners waited until June 1, 2010, the

filing of the Petition is jurisdictionally untimely and may not be entertained by this Court.

In addition, Petitioner TJ Biscayne, a limited liability company wholly owned by petitioner TJ Fisher, never filed an answer to the complaint or a motion to dismiss. Prior to the start of the trial, the Trial Court entered summary judgment as to liability against TJ Biscayne, who was represented by counsel. At any time up to and including the point at which summary judgment was granted, TJ Biscayne was free to raise the issue of personal jurisdiction but elected not to do so. For that reason, the Court of Special Appeals of Maryland "refuse[d] to address its jurisdictional argument[]" on appeal. 186 Md.App. at 111 n.13. This Court should refrain from permitting TJ Biscayne to raise this issue now for the same reason. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180, 99 S.Ct. 2710, 2715, 61 L.Ed.2d 464 (1979)(holding "neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.")

2. The Decision of the Court of Special Appeals of Maryland is not in Conflict with Decisions of any United States Court of Appeals or State Court of Last Resort, and is Entirely Within the Accepted and Usual Course of Judicial Proceedings Which This Court Has Consistently Declined to Disturb

Supreme Court Rule 10 explicitly provides that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion...[and] will be

granted only for compelling reasons." Rule 10 further provides while splits in authority regarding the interpretation of federal law are to be considered, they are "neither controlling nor fully measuring the Court's discretion" to grant a petition for certiorari. The presence of a split in authority has never been sufficient, in and of itself, to trigger certiorari review. Notably, and perhaps more importantly, where a split in authority has triggered certiorari review, it has traditionally been granted to resolve splits among United States courts of appeals, not among the state courts and certainly not among lower or intermediate courts.

Justice Scalia said, "the main purpose of our certiorari jurisdiction [is] to eliminate circuit splits" *Nunez v. United States*, 128 S.Ct. 2990, 171 L.Ed.2d 879 (2008)(Scalia, J., dissenting). "A petition alleging an intercircuit conflict is a prime candidate for the Court's attention. Petitioners are therefore likely to assert a conflict whenever any argument can be made for its existence, regardless of whether the conflict is important or whether it had any practical effect on the underlying action." Jacob Scott, *Article III En Banc: The Judicial Conference As an Advisory Intercircuit Court of Appeals*, 116 Yale L.J. 1625, 1635 n45 (2007)(citation omitted). The paramount objective of this Court is to achieve uniformity among the federal courts on important issues of federal law. Achieving uniformity among the state courts as to their interpretation of federal law is

neither practical nor required,[2] and uniformity among lower courts is of no concern to this Court.

Petitioners contend "[t]he lower courts are split on the question of whether allegations of a conspiracy are sufficient to establish personal jurisdiction" (Petition at 16). A split among trial courts is not remotely a basis for granting a writ of certiorari, and even a cursory review of the intermediate state and federal trial court cases cited by Petitioners reveals such a "split" to be manufactured. Those courts declined to uphold personal jurisdiction due to insufficiencies in plaintiff's allegations of conspiracy —not a rejection of the theory on constitutional grounds. Petitioners do not suggest any split among the state courts of last resort or the federal circuit courts of appeal because such a split does not exist.

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[2] [T]he Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (*Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 569, 18 Sup. Ct. 445, 42 L.Ed. 853), any more than in guaranteeing due process it assures immunity from judicial error (*Central Land Co. v. Laidley*, 159 U.S. 103, 16 Sup. Ct. 80, 40 L.Ed. 91; *Tracy v. Ginsberg*, 205 U.S. 170, 27 Sup. Ct. 461, 51 L.Ed. 755).

Milwaukee Elec. Ry. & Light Co. v. State of Wisconsin ex rel. City of Milwaukee, 252 U.S. 100, 106, 40 S. Ct. 306, 309, 64 L.Ed. 476 (1920). "[T]he Constitution of the United States does not guarantee that the decision of state courts shall be free from error, or require that pronouncements shall be consistent." *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299, 58 S. Ct. 185, 188, 82 L.Ed. 268 (1937)(citations omitted).

No state court of last resort has squarely rejected the theory of conspiracy jurisdiction, and all have made clear it may constitutionally be used as a basis for jurisdiction in appropriate factual scenarios.[3] The only two federal circuit court

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[3] *See Ex parte Reindel*, 963 So. 2d 614, 624 (Ala. 2007); *Instituto Bancario Italiano SpA v. Hunter Eng'g Co., Inc.*, 449 A.2d 210, 225 (Del. 1982)("[A] defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state..."); *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 585 (Fla. 2000)("[A]ccording to [the], [defendant] and the other conspirators committed a tortious act on Florida soil and subjected themselves to the jurisdiction of Florida courts."); *Green v. Advance Ross Electronics Corp.*, 86 Ill. 2d 431, 441, 427 N.E.2d 1203, 1208 (1981)("[W]hen a conspirator commits a tortious act within Illinois he does so as agent for his co-conspirators, who thereby also become subject to this State's jurisdiction."); *Merriman v. Crompton Corp.*, 282 Kan. 433, 474, 146 P.3d 162, 187 (2006)("The alleged conspiracy resulted in alleged economic harm to the plaintiff in Kansas. Jurisdiction over this tortious action can be based on the coconspirators' deliberate choice to enter into the conspiracy."); *Hunt v. Nevada State Bank*, 285 Minn. 77, 109, 172 N.W.2d 292, 311 (1969)("Once participation in a tortious conspiracy-the effect of which is felt in this state-is sufficiently established, actual physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction."); *Ashby v. State*, 279 Neb. 509, 531, 779 N.W.2d 343, 360 (2010)(Recognizing "[u]nder a coconspirator theory of jurisdiction, the actions of one conspirator are attributable to all the coconspirators for assessing jurisdictional contacts...."); *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 463, 388 S.E.2d 796, 798 (S.C. 1990)("In certain instances, an out-of-state defendant may be subject to jurisdiction under a long-arm statute on the theory that his co-conspirator conducted activities in a particular state pursuant to the conspiracy.");

holdings cited by Petitioners, *Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980) and *Textor v. Board of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983), explicitly recognized the viability of the theory of conspiracy jurisdiction. Petitioners have failed to demonstrate a split among the federal circuits and cannot hide the fatal flaw in their argument: the outcomes of the cases in which these issues have been addressed are a function of the sufficiency of the allegations or the nature of the proof, not a blanket determination of the constitutionality of attributing the conduct of a resident co-conspirator to a non-resident co-conspirator for purposes of establishing personal jurisdiction where the non-resident defendant has a reasonable expectation he may be sued in the forum as a result of those acts.[4]

Chenault v. Walker, 36 S.W.3d 45, 53-54 (Tenn. 2001)("[W]e find nothing explicit or implicit in these constitutional principles that would prohibit the exercise of jurisdiction based on the imputation of a co-conspirator's minimum contacts. To the contrary, we think that the conspiracy theory follows plainly from the very definition of conspiracy and the meaning of co-conspirator liability...."); *Nat'l Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995)("Due process will not permit the plaintiff to use insignificant acts in the forum to assert jurisdiction over all co-conspirators[,]" but not otherwise holding genuine acts in furtherance of the conspiracy can never be a proper basis of jurisdiction).

[4] *See Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980)(Declined to apply conspiracy theory because "allegations of conspiracy were purely conclusory...."); *Lehigh Val. Indus., Inc. v. Birenbaum*, 527 F.2d 87, 93-94 (2d Cir. 1975)(recognized but declined to apply conspiracy jurisdiction because "the bland assertion of conspiracy... is insufficient to establish jurisdiction...."); *Lolavar v. de Santibanes*, 430 F.3d 221, 229

Resolution of these issues is highly factually dependant, but merely because one or more state courts may adopt a narrower view of their own long-arm statue's accommodation of conspiracy

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(4th Cir. 2005)(acknowledging acceptance of conspiracy jurisdiction in *McLaughlin v. McPhail*, 707 F.2d 800 (4th Cir. 1983), declining to apply it because "there [were] no facts in the record as to Virginia contacts which serve to contradict the affidavit of [the non-resident defendant]."); *Ecclesiastical Order of the Ism of Am, Inc. v. Chasin*, 845 F.2d 113, 116 (6th Cir. 1988)(acknowledging acceptance of conspiracy jurisdiction in *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237 (6th Cir. 1980), but declined to apply it because plaintiffs' unsupported allegations were insufficient); *Textor v. Bd. of Regents of N. Illinois Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983)("...if plaintiff's complaint alleges an actionable conspiracy then the minimum contacts test has been met."); *Chirila v. Conforte*, 47 F. App'x. 838, 842-43 (9th Cir. 2002)(allegations of conspiracy were insufficient but conspiracy jurisdiction not unconstitutional); *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1069 (10th Cir. 2007)("The existence of a conspiracy and acts of a co-conspirator within the forum may, in some cases, subject another co-conspirator to the forum's jurisdiction."); *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1281-82 (11th Cir. 2009)(noting with approval that "Florida courts have held that the state's long-arm statute can support personal jurisdiction over any alleged conspirator where any other co-conspirator commits an act in Florida in furtherance of the conspiracy, even if the defendant over whom personal jurisdiction is sought individually committed no act in, or had no relevant contact with, Florida."); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1168 (D.C. Cir. 2002)("[T]o establish jurisdiction under a theory of civil conspiracy, the plaintiff must plead with particularity 'overt acts within the forum taken in furtherance of the conspiracy.' *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997)").

jurisdiction does not represent a "split" if the broader view adopted by other courts is within established constitutional guidelines. In any event, federal courts are not bound by state court decisions, and the decisions of all United States courts of appeal are unanimously in accord that conspiracy jurisdiction *per se* does not run afoul of the fourteenth amendment's due process clause. Consequently no review by this Court is necessary.

There is no reason this Court should entertain Petitioner's claim of significant disagreement or confusion regarding *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106 (1953), *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 579, 62 L.Ed.2d 516 (1980), and *Calder v. Jones*, 465 U.S. 783, 791, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Petitioner's interpretation of these holdings is no more than a re-packaging of their unfounded attempt to manufacture a split in authority requiring this Court's attention. There is no split in authority among the United States courts of appeal or the state courts of last resort on any important federal issue related to this case. Even the intermediate and lower state and federal court opinions Petitioner's enthusiastically cite represent nothing more than determinations of the sufficiency of allegations or proof and not a conflict on an important federal question. Petitioner's arguments regarding *Bankers Life, Rush, and Calder* are of a similar nature and ought to be disregarded.

Recognizing jurisdictional analysis is already an "imprecise inquiry," *Calder v. Jones*, 465 U.S. 783, 784, 104 S.Ct. 1482, 1484, 79 L.Ed.2d 804 (1984), and that a well developed line of cases provides ample guidance for lower courts on the

relationships between parties that may confer personal jurisdiction on non-residents, this Court has consistently denied certiorari petitions where lower courts have endorsed the conspiracy theory of personal jurisdiction. *See, Cameron v. Owens-Corning Fiberglas Corp.*, 695 N.E.2d 572 (Ill. App. Ct.), *appeal denied*, 705 N.E.2d 434 (Ill. 1998), *cert. denied*, 525 U.S. 1105 (1999); *Execu-tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So.2d 582 (Fla.), *cert. denied*, 498 U.S. 952 (1990); *Hammond v. Butler, Means, Evins & Brown*, 388 S.E.2d 796 (S.C.), *cert. denied*, 498 U.S. 952 (1990); *Hunt v. Nevada State Bank*, 172 N.W.2d 292 (Minn. 1969), *cert. denied*, 397 U.S. 1010 (1970); *Szeliga v. State of New Jersey, Dep't of Fin., Div. of Inv.*, 387 N.J. Super. 487, 904 A.2d 786, *cert. denied*, 550 U.S. 935 (2006). Petitioners advance no valid argument for this Court to depart from that practice.

3. The Court of Special Appeals of Maryland Correctly Stated The Applicable Rules of Law Governing Minimum Due Process Requirements For Exercise of Personal Jurisdiction Over A Non-Resident Participant In a Conspiracy in the Forum State, And Correctly Applied Those Principles To Petitioners

Int'l Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny permit the contacts of one person within a forum state to serve as the contacts of another person, provided requiring the nonresident defendant to defend its interests in the forum state "does not offend notions of fair play and substantial justice." *Id.*, 326 U.S. at

320, 66 S.Ct. at 160, 90 L.Ed. 95 While this theory of attribution has been long recognized as consistent with the due process clause of the 14th Amendment, the exercise of personal jurisdiction in this context is only permissible where the nonresident defendant purposefully established minimum contacts in the forum state. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 108, 107 S.Ct. 1026, 1030, 94 L.Ed.2d 92 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). Those contacts must be sufficient to cause the defendant to reasonably anticipate being haled into court in the forum or indicate the defendant has purposefully availed himself of activities within the forum state. *See, World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) (holding acts distributors take in distributing a manufacturer's product into a particular forum state may be attributed to a manufacturer for purposes of obtaining personal jurisdiction if the manufacturer placed its products into the stream of commerce with the expectation that they would eventually by purchased in the forum state.)

The basis for upholding personal jurisdiction is the non-resident's expectation he or she could be sued in the forum state, or what Justice Brennen explained as "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. at 472-72, 105 S.Ct. at 2181-82, 85 L.Ed.2d 528 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977))

Pursuant to this line of cases, the attribution theory of contacts has been used to establish personal jurisdiction over a non-resident in a variety of relationships. *See, Sher v. Johnson,* 911 F.2d 1357, 1362 (9th Cir. 1990) (holding because "[f]or purposes of personal jurisdiction, the actions of an agent are attributable to the principal," the acts of a partner are treated as acts of the partnership for purposes of determining whether personal jurisdiction is proper over the partnership); *Gallagher v. Mazda Motor of Am., Inc.,* 781 F.Supp. 1079, 1085 (E.D.Pa.1992) (holding the acts of a subsidiary may be attributed to a parent for jurisdictional purposes if the parent would have done these acts itself if the subsidiary did not exist); and *Bulova Watch Co., Inc., v. K. Hattori & Co., Ltd.,* 508 F.Supp. 1322, 1342 (E.D.N.Y.1981) (same). None of these relationships are inconsistent with the relationship among co-conspirators underlying the so-called conspiracy theory of personal jurisdiction.

Under well established Maryland law, a civil conspiracy is defined as

> ...a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use lawful means to accomplish an act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiffs.

Mackey v. Compass Marketing, Inc., 391 Md. 117, 128, 892 A.2d 479, 485 (2006). By virtue of this relationship civil co-conspirators are *de facto* agents of one another, *Western Maryland Dairy v.*

Chenowith, 180 Md. 236, 23 A.2d 660 (1942), and can be held liable for the acts of co-conspirators done in the furtherance of the conspiracy. *Id.* Starting with the principle of Maryland law that one co-conspirator is essentially the agent of another when performing acts pursuant to the conspiracy, attributing acts of one co-conspirator in the forum to a non-resident co-conspirator is merely an extension of this Court's carefully articulated and long-standing line of cases addressing minimum contacts/due process jurisprudence. In that respect this case presents nothing new beyond the traditional attribution theory of contacts analysis based on a relationship between two or more parties.

An equally well developed line of cases decided by this Court provides safeguards against courts overreaching when evaluating a non-resident's contacts with a particular forum. These cases hold that an individual cannot be subject to personal jurisdiction based on unilateral forum-related activities of a third party. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984) (holding acceptance of a check from a third party drawn on a bank located in the forum state cannot be considered in determining whether the acceptor of the check can be subjected to the personal jurisdiction of the forum state because it is the "unilateral activity of a ... third person"); *Kulko v. Super. Ct.*, 436 U.S. 84, 93-94, 98 S.Ct. 1690, 1697-98, 56 L.Ed.2d 132 (1978) (holding a forum state could not obtain personal jurisdiction over a parent in a custody action simply because the parent agreed to a visitation arrangement with the other parent and the other parent took the child to the forum

state and initiated suit, as this would "arbitrarily subject one parent to suit in any State of the Union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement"); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958) (holding Florida courts could not obtain personal jurisdiction over Delaware trust simply because powers of appointment under trust were executed in Florida because "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State").

The Court of Special Appeals of Maryland correctly articulated these well established principles when it affirmed the ruling of the Trial Court that petitioners were subject to personal jurisdiction under Maryland's long-arm statute, which states that "[a] court may exercise personal jurisdiction over a person, who directly **or by an agent**" performs certain enumerated acts, including transacting business, contracting to supply goods in the State, **or causing tortious injury** in or outside of the State. (Emphasis added), Md. Cts. & Jud. Proc. Code Ann. § 6-103(b).

To establish long-arm jurisdiction over a non-resident co-conspirator under Maryland law, the court must find the defendants entered into a conspiracy to do something they could reasonably have anticipated would have consequences in Maryland, and one of the conspirators committed overt acts in Maryland in furtherance of the conspiracy, which had they been committed by the nonresident co-conspirator would have been sufficient to subject that person to the long-arm

jurisdiction of a Maryland court. *Mackey, supra* (citing *Cawley v Bloch*, 544 F.Supp 133 (D. Md. 1982)).

In this case, the respondents' complaint contained detailed allegations that beginning in October, 2005, petitioners entered into a conspiracy to conceal and misappropriate $12 million in Insurance Proceeds from respondents. Because McCrary was not domiciled in Maryland at that time, petitioners argue it was "unforeseeable" he would move to Maryland and they consequently lacked a reasonable expectation they could be sued there. That is simply a red herring.

At the time petitioners entered into the conspiracy they knew Giannasca was a Maryland resident with his principal place of business in Maryland; they knew McCrary maintained his principal place of business in Maryland and had other significant Maryland ties. The Trial Court determined from the allegations in the complaint and the other evidence before him respondents unquestionably had "fair warning" they could be subject to personal jurisdiction in the state. Despite petitioners' claims to the contrary, the state of domicile of a plaintiff is not a dispositive factor. The complaint alleged that at all relevant times he maintained business offices and formally played professional football in Maryland and petitioners were aware of those facts. McCrary always maintained a residence in Maryland, and that Maryland had become his formal domicile at the time the complaint was amended adding petitioners as defendants is of absolutely no significance. The Trial Court had no doubt Petitioners were on notice

their scheme would result in Maryland being able to exercise personal jurisdiction over them.

Moreover, the Trial Court also determined overt acts were committed in Maryland by co-conspirators/agents of the petitioners in furtherance of the conspiracy. For example, the Complaint alleged that even though the first $1 million had already been received and secretly distributed among Giannasca, TJ Biscayne and Fisher, on October 26, 2005, in Giannasca's Maryland office, Giannasca falsely told McCrary's representative the insurance companies would probably deny the Insurance Claims. In December 2005, in Giannasca's Maryland office, Giannasca told McCrary and his representative the insurance companies *had* denied the Insurance Claims, and CCE would not receive any insurance proceeds. In January 2006, in Giannasca's Maryland office, Giannasca secretly executed and transmitted a "Sworn Statement in proof of Loss" and a "Release and Indemnity Agreement" to induce one of the insurance companies to make additional payments of Insurance Proceeds.

Finally, Petitioners' argument that they were denied due process because the lower court "imputed constructive knowledge of jurisdictional facts under the 'willful blindness' theory" is a complete distortion of the record. In the transcript of the hearing on the Motion to Dismiss filed by TJ Fisher and Market Street[5] the judge found respondents' complaint

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[5] Petitioner TJ Biscayne did not file a motion to dismiss based on lack of personal jurisdiction or any other response to respondents' complaint, resulting in summary judgment

articulated **multiple grounds** in support of Maryland's exercise of personal jurisdiction. In their argument, counsel for TJ Fisher and Market Street tried to advance the notion respondents' allegations cast her as being at best "willfully blind" to the facts[6] that tied her to the conspiracy, but the Trial Court's ruling was not based on this theory. Ruling from the bench, Judge Alfred Nance stated

> It is alleged by plaintiffs that, in fact, at that time not only did Giannasca and "Neil" Fisher know, but that, in fact, that they and [TJ Fisher] knew at that time and had begun the diversion of the proceeds from the insurance of the said towers...not only was there furtherance of the agreement, the agreement that was advised and made activity in Baltimore, but there was diversion of the funds as a result of the unlawful agreement into accounts held by, orchestrated, or controlled by [TJ Fisher] most notable as to the Market Street Properties.... It is alleged, as a result of the agreement, that, in fact, the funds, whether it's the five million dollars, or whether or not it's the 1.2 or

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entered against it at trial. See Reason 1 for Denying Certiorari *infra*.

[6] Tamara fantastically maintained she was unaware of over $5 million of Insurance Proceeds were deposited in her personal bank account and TJ Biscayne's bank account, which she subsequently invested in another real estate project in which she had an ownership interest through Market Street.

> two million dollars diversions, if you will, at points in time, is that it had a direct allegation, if you will, or an allegation of a direct connection with that of [TJ Fisher].
>
> ...
>
> The Court went on to say:
>
> [G]iven Giannasca and "Neil" Fisher's activity in Maryland, the connection of [TJ Fisher] prior to, during, and after, that the... agreement and the conspiracy is well-pled to defraud the plaintiffs in this case. The activities:. occurring and originating in Maryland, as actions in furtherance of the conspiracy is well-pled....

April 28, 2008 Motions Hearing, (J. Nance), Circuit Court for Baltimore City, Maryland. At that hearing TJ Fisher's attorney also conceded that contrary to her affidavit, she held an ownership interest in the entity who originally had the contract to purchase the Building and had a $4 million mortgage paid from the proceeds of sale in November, 2005. The Trial Court found multiple grounds upon which it concluded Maryland's exercise of personal jurisdiction over petitioners TJ Fisher and Market Street was consistent with applicable due process standards– and did not rely on a "willful blindness" or constructive knowledge theory.

4. This Case Does Not Provide a Suitable Record for Articulation of a Clear Factual Threshold For A Determination of Minimum of Due Process Standards for Personal Jurisdiction.

The procedural history of this case is highly unusual and derives from the contemptuous and obstructive conduct of the defendants before the Trial Court. Because as made clear in Supreme Court Rule 10 "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," a suitable case for articulation of important principles of due process must of necessity be one where the record as to the essential facts is not unduly complicated or murky.

TJ Fisher refused to respond to a document subpoena or appear for her deposition scheduled prior to the hearing on the Motion to Dismiss, and because she also declined to appear at the hearing, she avoided scrutiny of her allegations of jurisdictional facts and relied solely on an affidavit accompanying the Motion to Dismiss.

At the hearing on the Motion to Dismiss, the Trial Court properly considered other sources which directly contradicted her affidavit, including allegations in the complaint deemed true for the purposes of the motion, McCrary's affidavit and documentary exhibits attached thereto, and admissions by her own attorney directly contradicting assertions in TJ Fisher's affidavit that she had no connection with the business of Crescent City.

From the information properly before it, the Trial Court determined the existence of a conspiracy, commission of acts in furtherance of the conspiracy in Maryland, petitioners' participation in the conspiracy, and sufficient knowledge of Giannasca and McCrary's connections to Maryland to give petitioners fair warning of Maryland as a likely forum for any litigation resulting from participation in the conspiracy.

TJ Fisher failed to appear for a subsequent deposition, and ultimately orders of default were entered against all defendants including petitioners, for failure to make discovery or failure to answer the complaint. Giannasca and Fisher were held in contempt, and, to this day, a body attachment is outstanding for Fisher as well as an accumulated $1,000 per day fine, totaling over $1 million.

Although the Motion to Dismiss filed by TJ Fisher and Market Street was denied, allowing the respondents' claims to advance to the pretrial phase, "[t]theoretically, the issue of jurisdiction ... remain[ed] open ..." in a practical sense. *See* Robert C. Casad and William B. Richman, Jurisdiction in Civil Actions, 483 (3rd ed. 1991) Similar to questions of agency, where long-arm jurisdiction is predicated upon a defendant's participation in a conspiracy, even though the issue may have been determined adversely on a preliminary motion, the same question may still be litigated to determine the substantive merits of a claim.[7] *Id.* Here,

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[7] "... [B]ut, as in the agency situation, if the plaintiff fails to prove conspiracy at trial, and that is an element of the claim on

respondents' allegations concerning the existence of a conspiracy and other jurisdictional matters were established by default because of petitioners' total disregard for the orders of the Trial Court and the rule of law. The theoretically "open" questions related both to personal jurisdiction and liability on the merits were resolved not through litigation on the merits, but by entry of defaults, affording a limited record for appellate review of an otherwise fact specific question.

Entries of default are highly disfavored by courts. In *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970) the court said, "[t]he preferred disposition of any case is upon its merits and not by default judgment." While

> a default judgment plays an important role in the maintenance of an orderly, efficient judicial system as a weapon for enforcing compliance with the rules of procedure and for facilitating the speedy determination of litigation[] ... there is a marked judicial preference for deciding disputes on their merits and for giving parties their day in court, especially in cases involving material issues of fact, substantial amounts of money, or weighty policy determinations.

10 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2681 (1973).

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the merits, the court will grant judgment against the plaintiff on the merits rather that dismiss for lack of jurisdiction." *Id.*

Granting a writ of certiorari in this case would result in articulation of principles of constitutionality of the conspiracy theory of personal jurisdiction in a case lacking full judicial scrutiny including active participation by petitioners in litigating their challenge to jurisdiction in this context. On such a one-sided record–which, albeit correctly, accepts respondents' allegations as established–it is impossible for this Court to divine the extent of petitioner's forum contacts with any clarity. Judgment by default may be "conclusive of the question of jurisdiction and of the power of the court to enter final judgment," *Cooper v. Roche*, 36 Md. 563, 565 (1872), but a decision on the constitutionality of the conspiracy theory on this record would cause more problems than it would solve.

Conclusion

For the reasons stated, respondents respectfully request the petition for a writ of certiorari be denied.

Respectfully submitted,

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